Supreme Court,
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No. 88-2020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OTIS HINDMAN,

Petitioner,

v.

THE CITY OF PARIS, *et al.*,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the jury finding that the warrant for Mr. Hindman's arrest was issued without probable cause entitled him to a judgment notwithstanding the additional finding that the arresting officers did not, in obtaining it, intentionally or recklessly mislead the magistrate.

2. Alternatively, whether the case warrants review by the Supreme Court.

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SUMMARY OF ARGUMENT

The finding by the jury that no probable cause existed for the issuance of the arrest warrant is without force in law. As presented this was a legal question, dependent on underlying facts. In an earlier appeal of the case (Hindman I) the Court of Appeals held as a matter of law that the warrants of search and arrest were valid unless the supporting affidavit was impeached. No testimony was elicited impeaching it. The courts below correctly held the arrest was properly made. Beyond question the supporting affidavit has sufficient indicia to justify issuance of the warrants of search and arrest.

The holdings of the courts below being consistent with the Supreme Court's views expressed in enumerable holdings in this much litigated field of the law, and as the case "plows no new ground", it is not of sufficient import to warrant further review.

ARGUMENT

First Question: Whether the jury finding that the warrant for Mr. Hindman's arrest was issued without probable cause entitled him to a judgment notwithstanding the additional finding the arresting officers did not, in obtaining it, intentionally or recklessly mislead the magistrate.

In his "Statements of the Case" the petitioner says it was first tried ". . . . on the theory that factual misrepresentations by the defendant police officers invalidated both the search and arrest warrants that had been jointly (and customarily) issued"; and was re-tried ". . . . on the sole issue that there was no probable cause factually or as stated in the affidavit to support the arrest warrant". Elsewhere ("Reasons for Granting the Writ," Page 7), the petitioner says:

> "The Petitioner at this time takes no issue with the portion of the Hindman I opinion holding that there was probable cause stated (if truthful) for a search warrant: There were sufficient facts alleged which, if true, would establish probable cause for a search. However, there was no probable cause alleged to issue an arrest warrant for Otis Hindman." (Page 7)

The petitioner is saying that regardless of anything else he is entitled to recover because the jury found the warrant for his arrest was issued without probable cause. Such is not the posture of the case.

Anderson v. Creighton et al., 483 U.S. ___, 107 S.Ct. 3034, 97 L Ed 522 91987), involved a warrantless search. At the outset of the opinion Justice Scalia, writing for the majority of the Court, posited the following: "The question presented is whether a

federal law enforcement officer who participated in a search that violated the Fourth Amendment may be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." Although there dealing with a warrantless search not followed by arrest, everything said equally applies to the present lawsuit, and is therefore quoted from at length:

> "Our cases have accommodated these conflicting concerns (actions for damages for vindication of constitutional rights versus concern that officials not be unduly inhibited in the discharge of their duties) by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, E.G., Malley v. Briggs, 475 US 335, 341, 89 L Ed 2d 271, 106 S.Ct. 1092 (1986) (qualified immunity protects 'All but the plainly incompetent or those who knowingly violate the law'); id., at 344-345 89 L Ed 2d 271, 106 S.Ct 1092 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); Mitchell v. Forsyth, 472 US 511, 528, 86 L Ed 2d 411, 105 S.Ct 2806 (1985) (officials are immune 'unless the law clearly proscribes the actions' they took); Davis v. Scherer, 468 US 183, 191, 82 L Ed 2d 135, 104 S Ct 2012 (1984); id., at 198, 82 L Ed 2d 139, 104 S Ct 2012. (Brennan, J., concurring in part and dissenting in part); Harlow v. Fitzgerald, supra, at 819, 73 L Ed 2d 396, 102 S Ct

> 2727. Cf., e.g., Procunier v. Navarett, 434 US 555, 562, 55 L Ed 2d 24, 98 S Ct 855 (1970). Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reaasonableness' of the action, Harlow 457 US, at 819, 73 L Ed 2d 396, 102 S Ct 2727, assessed in light of the legal rules that were 'clearly established' at the time it was taken, id., at 818, 73 L Ed 2d 396, 102 S Ct 2727." (*Opinion*, 97 L Ed 2d 530)

Except for unsupported statements in the Petition for Writ of Certiorari the respondent officers' predicate affidavit stands unimpeached.

In *United States v. Burzinski Cancer Research Institute et al.* (5th Cir. 1987), 819 F2d 1301, 1309-1310, cert. den., Dr. Burzinski counterclaimed for damages because of an unlawful search and seizure by Food and Drug Administration personnel, claiming waiver of their qualified immunity. Although not strictly of precedential value, the facts of the case and the language of the opinion are pertinent and persuasive:

> "Dr. Burzinski's counterclaim does contain an allegation that the search warrant "was not supported by affidavits and evidence sufficient to establish probable cause.' Based on no more than this unsupported charge, and despite the admonition of the Supreme Court in Franks v. Delaware (438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684, 57 L Ed 2d 667) that to mandate an evidentiary hearing such a charge must also assert deliberate

> falsehood or reckless disregard for truth and must be accompanied by an offer of proof, ..." (Opinion, Pages 1309-1310)

The statement in the Petition for Writ of Certiorari adverted to above, that ". . . . the search and arrest warrants had been jointly (and customarily) issued", indicates the desirability of an explanation, and justifies amplification of the testimony of prosecuting attorney Tom Wells.[1]

Tom Wells, called as a witness by the petitioner, testified that at the time in question, January of 1978, he had been County Attorney about a year and the form utilized by his office was a combination search and arrest warrant (authorized by *Article 18.03, Texas Code of Criminal Procedure*). (Tr 51-52) The County Attorney's office then had no form for a search warrant which did not include an arrest warrant. (Tr. 73 & 80)

The officers informed him that Mr. Hindman had seventeen Fleetwood tires in his possession, Fleetwood tires had been stolen from Hardy Oil Company, the only distributor of them in Northeast Texas, three hundred tires were missing, and any such tires the petitioner might have "would have to be purchased or stolen from Mr. Hardy." (Tr. 53) They also told Mr. Wells they had received information ". . . . there was a black man in town that was selling Fleetwood tires for twenty-five dollars apiece. That they were

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[1] The Record consists of five volumes, three of which contain the proceedings on the first, bifurcated trial. The last two volumes contain the transcribed testimony on the second trial, and not much more, identified in this Answer and in the Petition for Writ of Certiorari as Transcript (Tr.).

being stolen from Hardy Oil Company. That they received information from an informant, confidential informant, that he had sold these tires, or some tires, to Mr. Hindman". (Tr 54-55)

"Mr. Wells, was any of the information that you wrote into this affidavit intended by you as information to support to (the) issuance of an arrest warrant?

"At the time these were given (sic) they were primarily looking for the tires to determine if they were Hardy Oil Company tires. If they were discovered to be Hardy Oil Company tires, the form that we used at that time was also an arrest warrant included therein.

"Now, let me ask you the other question. Did you put information specifically in this affidavit for an arrest warrant or only for a search warrant?

"No, not at that time, I did not.

"So, the information you put in here was solely for a search warrant, then?

"Well, at the time that we did this we didn't differentiate between the two. We now have changed where we added another paragraph for the arrest warrant portion.

"When did you change that, sir?

"I couldn't tell you the exact date. It was when we became aware of some Supreme Court decisions saying that we had to add additional information.

"Can you give us an approximation of the date?

> "I would say probably in '81—'80 or '81, somewhere in there." (Tr 63)

Asked on cross-examination whether officer Smith had given him any more details about what he had done at the Hindman service station in the way of identifying or viewing the seventeen tires, Mr. Wells testified, as he recalled, that Smith told him the Fleetwood tires were in the washroom area of petitioner's service station. ". . . . In his possession and unexplained as to how they got there and that he would not explain to them how they got into Hindman's possession" (Tr 65); thus establishing presumptively the commission of a theft by an unexplained possession of stolen property, any exculpatory explanation being a matter of defense (Tr 72-73).

> "Then, too, our Code of Criminal Procedure specifically provides that there can be a search warrant and warrant of arrest all in one instrument?
>
> "That is correct." (Tr 67)

The form utilized was promulgated by Mr. Wells (Tr 73), who explained that soon after his election as County Attorney he attended a seminar in Dallas for newly elected prosecutors and was there furnished the form of search warrant, with an arrest warrant built in, which was prepared for the officers (Tr 67); and stated the form was the one they regularly used: "In probably eighty to ninety percent of the cases; the exceptions being if you were searching for blood or some forms of evidence, there would be a different search warrant, or some type of physical evidence from the body of a person and things like this it would be different" (Tr 79-80).

At that time the County Attorney's office made no distinction between issuance of a search warrant and a search warrant incorporating an arrest warrant. (Tr 79-80)

The warrant commanded the officers to enter the described premises and search for the property, "and to seize same and bring it before me and to arrest and bring before me each suspected party named in said affidavit (for the warrant)" (Tr 71). Mr. Wells agreed that once the warrant was issued by the magistrate it became the sworn duty of the officers to carry it out, and that it was his opinion the affidavit was "sufficient to justify the issuance of a search warrant and warrant and (of) arrest". (Tr 71-72)

Not only were the officers entitled to rely on the prosecuting attorney's form and office procedures, they had no other source to turn to; further, the petitioner offered no evidence to prove that a reasonably well informed officer would have acted differently. Clearly, ". . . . a reasonable officer could have believed . . . ." the proceedings were not violative of petitioner's Fourth Amendment rights.

The Court has repeatedly held that only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost. *United States v. Leon*, 468 U.S. 897, 104 S Ct 3405, 82 L Ed 2d 677 (1984), and *Malley v. Briggs*, 475 U.S. 335, 89 L Ed 2d 271, 106 S Ct 1092 (1986).

The prosecuting attorney who wrote the affidavit here in question, presumably the District Judge, and expressly the judges of the Court of Appeals found the warrant application contained sufficient indicia of

probable cause to justify issuance of the warrant. No basis therefore exists for a claim that a reasonable police officer in the position of respondents Whitley and Smith would have acted differently.

The warrant application states probable cause, the argument of petitioner to the contrary notwithstanding:

> 1. That the tires were in the possession of and being concealed by the suspect, Otis Hindman (omitted by petitioner);
>
> 2. They were stolen from E. G. Hardy Oil Company (also omitted by petitioner);
>
> 3. The officers had other information including that of a reliable informant about the theft and suspicious sales as quoted by petitioner at page 4 of the Petition for Writ.

The magistrate properly concluded there was probable cause for the belief the tires were stolen from Hardy and sold to Hindman under sufficiently suspicious circumstances to establish that Hindman knew, or should have known, the tires were stolen. The law in Texas and the nation is not that the supporting affidavit for the warrant must state the accused knew the property to be stolen, as petitioner avers. Rather, the law is that a prima facie case of theft is made out where one is in possession of recently stolen property, particularly when concealed from public view. As earlier mentioned, this presumption can be overcome by the accused making a satisfactory explanation of his possession, a defensive burden of proof. *Robinson v. State* (Tex.Ct.App. 1987), 728 SW2d 858; *Ellis v. State* (Tex.Ct.App. 1985) 691 SW2d 791. Petitioner refused to make any explanation to the

officers of his possession of what appeared to be recently stolen property. Officers are not required prior to making an arrest to investigate and verify every possible defense an accused may raise at trial. *Baker v. McCollan*, 443 US 137, 61 L Ed 2d 433, 99 S Ct 2689 (1979).

Second Question. Alternatively, whether the case warrants review by the Supreme Court.

The second question is a horse soon curried.

A review by Writ of Certiorari ". . . . will be granted only where there are special and important reasons therefor". *Supreme Court Rule 17.1.* Ordinarily the Supreme Court ". . . . cannot be . . . . concerned with achieving individual justice in individual cases". The Court's time needs ". . . . be devoted more and more to constitutional and statutory questions that are likely to have widespread general import". "General public importance of the issues and the need to secure uniformity of federal law must be the basic touchstone". *Federal Practice and Procedure*, Vol. 16, Section 4004, Pages 507-508.

The foregoing excerpts, presumptuous in their implication, are utilized to contrast the present case with the desiderata; A discarded practice of the prosecuting attorney's office is involved, that of combining search and arrest warrants; one for which, incidentally, the respondents are not to be held accountable.

CONCLUSION

Respondents submit the Court of Appeals has rendered a proper judgment in the case, following the law enunciated by the Supreme Court, and that this case does not raise any new issues or matters which would justify further review.

Wherefore, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

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ARTICLE 18.03, TEXAS CODE OF CRIMINAL PROCEDURE

If the facts presented to the magistrate under Article 18.02 of this chapter also establish the existence of probable cause that a person has committed some offense under the laws of the state, the search warrant may, in addition, order the arrest of such person.